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Supreme Court of the United States

October Term, 1980

UNIVERSAL WASTE CONTROL and
WASTE MANAGEMENT, INC.,
Petitioners,

v.

WESTERN WASTE SERVICE SYSTEMS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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In The
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BRIEF IN OPPOSITION

Western Waste Service Systems, Inc. requests that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 4, 1980, be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit properly determine that there is a sufficient nexus between the garbage business in Phoenix, Arizona, and interstate commerce to involve the jurisdiction of the Sherman Act?

2. Did the Ninth Circuit act properly in applying the McLain standard by refusing to resolve on appeal the factual issues raised by the Complaint as supplemented by depositions and interrogatories?

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STATEMENT OF THE CASE

The issue raised by this Writ is whether the garbage business in Phoenix, Arizona, is subject to the provision of the Sherman Act. The facts as developed in the trial court reveal a sufficient nexus between that business and interstate commerce.

The record, consisting of the Complaint as supplemented by depositions and interrogatories[1], demonstrates that the Phoenix garbage business is closely tied to interstate commerce. Universal, for example, spent $69,680 in 1975 and $356,061 in 1976 for garbage collection equipment which was purchased from out-of-state suppliers. Western Waste, the Plaintiff, spent $88,335 and $124,007 during those same years for out-of-state equipment.

It was also demonstrated that as a part of the business garbage collection companies in Phoenix sometimes haul recycled materials, which are then hauled out-of-state for recycling and, ancillary to their business, Universal and Western Waste from time to time sell garbage compaction units which are purchased from out-of-state suppliers. It was also established that Universal used its purchasing power to cause a supplier of garbage compactors to terminate Western Waste's right to resell those packers in Phoenix.

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[1]This is the appropriate method for determining the facts at this stage of the proceedings, as indicated by this Court in McLain v. Real Estate Board of New Orleans, Inc., 100 S.Ct.502 (1980).

WRIT OF CERTIORARI SHOULD BE DENIED

I. Interstate Commerce is Affected by the Garbage Business, and the Ninth Circuit Properly Applied the Sherman Act Standard

The major argument made by Universal is that the Ninth Circuit improperly applied interstate commerce standard in determining that the garbage business in Phoenix is part of or affects interstate commerce. The Ninth Circuit relied upon this Court's recent ruling in McLain v. Real Estate Board of New Orleans, Inc., 100 S.Ct. 502 (1980). In McLain, this Court found that the real estate brokerage business affects interstate commerce and Sherman Act jurisdiction is appropriate. The Court summarized as follows:

> To establish the jurisdictional element of a Sherman Act violation, it would be sufficient for petitioner to demonstrate a substantial effect on interstate commerce generated by respondants' brokerage activity.

The issue before the Ninth Circuit was, then, whether Universal's garbage business had a substantial effect on interstate commerce.

The Ninth Circuit found that based on the record before it, there was such sufficient nexus between Universal's business and interstate commerce to supply the necessary showing of substantial effect.[2] Interstate commerce is affected by Universal's business, first, because Universal

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[2]Western Waste Service Systems, Inc. v. Universal Waste Control, 616 F.2d 1094 (9th Cir. 1980).

supplies its business with substantial purchases of equipment from out-of-state suppliers.[3] Universal's business also involves interstate commerce because Universal and other haulers in the Phoenix market haul materials placed into interstate commerce in the recyclables market and also handle garbage equipment such as packers, which are purchased from out-of-state dealers.

In determining that there was a sufficient showing of interstate commerce the Ninth Circuit found as follows:

> In any event the facts here are sufficiently different from those in Sun Valley so as to confer jurisdiction on the District Court under the Sherman Act. First, a direct restraint on a line of interstate commerce is present here while none was present in Sun Valley. Second, Universal hauls several tons of the waste which it collects to scrap dealers and paper brokers which ship these materials out of state. Universal's argument that its role is somehow incidental to the shipping of these materials out of state and that this defeats jurisidiction was expressly rejected by the Supreme Court in Rex Hospital and McLain. In McLain, the Supreme Court declared that jurisdiction under the Sherman Act is not defeated by a plaintiff's failure to "quantify the adverse impact of defendant's conduct."

616 F.2d at 1095.

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[3]A similar finding was found to be sufficient to involve the Sherman Act in Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976).

Based upon McLain and the record before the lower court, it can be seen that the Ninth Circuit properly applied the standards of McLain in determining that there was a sufficient nexus between the Phoenix garbage business and interstate commerce, and that Sherman Act jurisidction was appropriate.

II. The Ninth Circuit Properly Applied McLain v. Real Estate Board in Resolving All Factual Disputes in Favor of the Plaintiff

The Ninth Circuit refused to make a factual finding as to the Sherman Act jurisdiction issues raised by the evidence at this stage of the proceedings, but rather accepted the allegations of the Complaint as supplemented by the evidence as true. In applying this standard rather than resolving factual disputes, the court followed the rationale of McLain, supra. McLain also arose out of a motion to dismiss on the grounds that there was no interstate commerce. The lower court allowed discovery as to that issue and granted the defendant's motion to dismiss. This Court, in reaching its conclusion that a sufficient demonstration of interstate commerce had been made, clearly applied the rule that a plaintiff in an antitrust case will not be deprived of his day in court unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 335 U.S. 41, 45-46, 78 S.Ct. 99, 101, 102, 2 L.Ed.2d 80 (1957).

The McLain court specifically noted as follows:

> Reading the pleadings, as supplemented, most favorably to petitioners, for present purposes we take

> these facts as established.
>
> At trial, respondents will have the opportunity, if they so choose, to make their own case contradicting this factual showing.

100 S.Ct. at 510.

This is precisely the rule which was applied by the Ninth Circuit in the case now being considered by this Court. Universal, notwithstanding the clear language of McLain, claims that the Ninth Circuit improperly applied the rule or that there is a dispute between the Circuits as to this issue.

Universal's only citation in support of its claim that there was a conflict between the Circuits is Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir 1980), which Universal claims illustrates that "procedural confusion" in the Circuits is not limited to antitrust cases. What Universal really means is that there are no Sherman Act cases supporting Universal's claim and that the Ninth Circuit followed the McLain case in resolving this issue.

The review of Menchaca reveals that it is not relevant because Menchaca did not involve a Sherman Act case but rather involved the provisions of the Civil Rights Act. Menchaca also involved a situation in which the lower court had, in fact, held an evidentiary hearing as to the issues raised and the court merely reviewed the lower court's decision.

Sherman Act cases are complex and the issue of jurisdiction is inextricably woven into the issue of liability.[4] This Court's ruling in the

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[4]The defendants claim that the Court should require the trial court to make a factual determination as to Sherman Act jurisdiction because this would reduce caseloads in federal court.

McLain case, that once evidence is produced that interstate commerce exists, the issue is one for the ultimate trier of fact is appropriate.

Because there is no conflict between the Circuits on this issue and because the Ninth Circuit properly applied the McLain standard, the Writ of Certiorari should not be granted.

The courts have already fashioned a prima facie requirement; that is, the plaintiff must come forward with some facts before entitled to a full trial. This has the effect of eliminating those cases which are clearly not subject to Sherman Act jurisdiction. The Defendant's proposed argument or rule that jurisdictional issues should be tried first would result in additional trials in virtually every Sherman Act case and would result in additional delay and work load.

CONCLUSION

This Court should deny the Writ of Certiorari because the Ninth Circuit properly found interstate commerce jurisdiction to be appropriate, and there is no conflict between the Circuits as to the appropriate resolution of a motion to dismiss for lack of jurisdiction in Sherman Act cases.

Respectfully submitted,

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August, 1980

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
:ss.
County of Maricopa)

HENRY G. HESTER, being first duly sworn, upon his oath deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Respondent in this cause; that on this 1st day of August, 1980, he mailed four copies of the Brief in Opposition in this cause by depositing the Brief in the United States Mail, first class postage paid, to:

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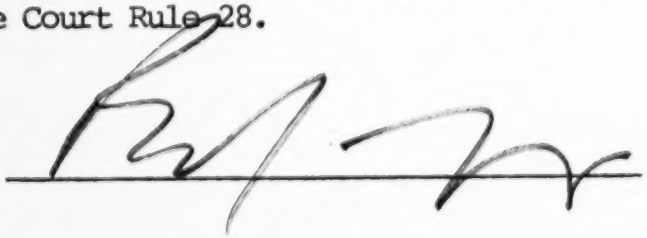
and that he also then mailed 40 copies of the Brief to the Clerk of this Court in compliance with Supreme Court Rule 28.



SUBSCRIBED AND SWORN TO before me this first day of August, 1980.

Ingrid R. Hickey
Notary Public

My Commission Expires:

June 26, 1981